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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

v.

NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINION BELOW

The affirmance by the Appellate Division, Second Department was without opinion and is reported at 43 A.D. 2d 816. The order of affirmance appears in the printed appendix at page 98. On March 22, 1974, the Appellate Division amended its remittitur to certify that a constitutional question had been passed upon. This order appears in the printed appendix at page 100. Leave to appeal to the Court of Appeals was denied on

January 31, 1974, by Associate Judge Harold Stevens. The certificate denying leave to appeal to the Court of Appeals appears in the printed appendix at page 99. No opinions have been rendered.

JURISDICTION

The judgment and order of the Appellate Division was entered on December 24, 1973. Leave to appeal to the Court of Appeals was denied on January 31, 1974. Notice of appeal was filed in the Supreme Court of the State of New York, Richmond County, the court possessed of the record, on April 8, 1974. The appeal was docketed on April 18, 1974 and probable jurisdiction was noted by the Court on October 21, 1974. The jurisdiction of the Court is invoked pursuant to Title 28 of the United States Code, Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

* * *

United States Constitution, Amendment XIV, Section 1

* * *

New York Criminal Procedure Law, Section 320.20(3):

Non-jury trial, nature and conduct thereof.

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court grants such permission to one party it must grant it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of Section 260.30.

(c) The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

QUESTION PRESENTED

Whether Section 320.20(3)(c) of the New York Criminal Procedure Law, which authorizes a trial judge to prohibit closing argument in a non-jury trial is, on its face and as applied, violative of the Due Process Clause of the Fourteenth Amendment and the right to counsel provision of the Sixth Amendment.

STATEMENT OF THE CASE

Charged with attempted robbery in the first and third degrees and possession of a dangerous instrument,[1] appellant waived his right to a jury trial pursuant to Section 320.10 of the New York Criminal Procedure

[1] New York Penal Law §§ 110.00/160.15; 110.00/160.05; 265.05.

Law and on February 3, 4 and 7, 1972, was tried before a justice of the New York Supreme Court.

The People's Case

On February 3, 1972, the testimony of Allen Braxton, the complaining witness, was taken. Braxton testified that on September 15, 1971, at about 6:00 p.m., he was outside his home, a housing project on Staten Island, transferring some money from his pants pocket to his wallet when appellant approached him (App. 5, 6, 9, 15).[2] Appellant, whom he recognized from the neighborhood, said in a soft voice "[p]lease give me some money, I am sick" (App. 7, 18, 35). When Braxton refused, appellant took a knifeblade out of his right pocket and flicked his right wrist at Braxton, whereupon Braxton ran into his building (App. 6, 19). The entire encounter lasted approximately thirty seconds (App. 26).

Braxton immediately reported the incident to William Stubbs, a family friend and New York City Housing Authority Policeman (App. 9, 11, 24).

Following Braxton's testimony, the case was adjourned until the following morning, February 4, 1972, at which time William Stubbs testified. Stubbs, who had been dismissed from the police force some time after the incident in question, stated that he had known both Braxton and appellant before the date of the alleged incident but did not witness it himself (App. 51, 58). Rather, he learned of it from Braxton at about 6:00 p.m. on the evening of September 15, 1971. About an hour and a half later, while patrolling the area, he came upon Braxton and appellant standing on opposite sides

[2] Numerical references preceded by "App." are to the printed appendix.

of one of the neighborhood streets (App. 52-54). When Stubbs approached appellant and notified him of Braxton's accusation, appellant immediately denied having attempted to rob Braxton and told Stubbs that he had been working for a Mr. Taylor at the time Braxton claimed appellant had tried to rob him (App. 54, 60). Stubbs placed appellant under arrest and found a small knife blade on appellant's person (App. 54, 55).[3]

The People then rested and the case was adjourned over the weekend (App. 65, 68).

The Defense

On Monday morning, February 7, 1972, appellant's case was recessed until the afternoon to accommodate the schedule of his employer, Donald Taylor (App. 71). At about two o'clock that afternoon, the case was recalled and Mr. Taylor, the president of A & A Tank Cleaning Company on Staten Island, testified that on September 15, 1972, appellant was at work at 6:00 p.m. (App. 71, 73). Although unable to swear to the exact time he had seen appellant on his premises that day, Taylor did remember seeing him there at about 5:30 or 6:00 p.m. as well as later than 6:00 p.m. (App. 156, 157). He also remembered talking to appellant sometime during the evening and before he left for home at about 9:00 or 9:30 p.m. (App. 81). Less than an hour later, appellant called him at home and said he had been arrested (App. 81).

[3] At the end of the People's case, the court dismissed the charge of possession of a dangerous instrument on the grounds that the blade was too small to fall within the purview of Penal Law §265.05 (App. 66).

Appellant also took the stand and denied attempting to rob Braxton. He stated that he had been at work until at least 6:30 p.m., and pointed out that the shop was some ten minutes away from Braxton's home (App. 84-87). Appellant further testified that he had previously been Braxton's next door neighbor and that on occasion Braxton had asked him for money for drugs[4] or wine. Indeed, each time appellant refused, Braxton called him a name or threatened to "fix" him (App. 85-86).

The Verdict

After both sides had rested and a motion to dismiss the charges was denied, defense counsel requested an opportunity to make a closing argument, stating: "Well, can I be heard somewhat on the facts?" The court, relying specifically on the statute involved herein denied his request, replying: "Under the new statute, summation is discretionary, and I choose not to hear summations" (App. 92).

Eight minutes later, the court found appellant guilty of attempted robbery in the third degree (App. 93). On June 15, 1972, appellant was sentenced to an indeterminate term of imprisonment with a maximum of four years (App. 96).

The Appellate Division, Second Department, affirmed the conviction without opinion on December 24, 1973 (App. 98). Leave to appeal to the Court of Appeals was denied on January 31, 1974 (App. 99).

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[4] Both appellant and Braxton admitted that they had used narcotics (App. 41, 87).

SUMMARY OF ARGUMENT

I.

Section 320.20(3)(c) of New York's Criminal Procedure Law, which authorizes the court in a non-jury trial to preclude closing argument, deprives a defendant of his constitutional rights to be heard in his own defense and to the effective assistance of counsel.

The right of a criminal defendant to be heard in his own defense is inextricably entwined with his right to the "guiding hand of counsel" at all critical stages of the criminal process. The Court's decisions in *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *Ferguson v. Georgia*, 365 U.S. 570 (1961) establish that the professional skill of a trained advocate is essential to the effective planning of a defense and to the presentation in organized, coherent and logical fashion, of the factual and legal side of a defendant's case and that statutes which abridge counsel's basic role will not pass constitutional muster.

Like the statutes struck down in *Brooks* and *Ferguson*, section 320.20(3)(c) is unconstitutional because it sanctions the denial of a defendant's right to the benefit of counsel's skill in sifting, organizing and presenting to the fact finder the strengths of his case and the weaknesses of the prosecution's evidence. It thus deprives an accused of the "guiding hand of counsel" at the critical fact-finding stage of the trial process.

The statute is also at odds with the historical development of closing argument within our adversary

system. Indeed, it runs counter to the overwhelming weight of authority.

II.

Closing argument, whether to a judge or jury, diminishes the possibility of error in the fact-finding process. While a judge has legal expertise, he does not differ from a juror in his attentiveness or ability to remember salient facts. The possibility of error may be even greater in a bench trial because the jury's judgment, being collective, at least furnishes some assurance of reliability. Where a judge sits alone, without the benefit of summation, the issue of guilt or innocence is relegated to the subjective impression which he alone has garnered from the trial. In our over-worked urban courts, preclusion of closing argument is especially threatening to the reliability of our trial process. For in those courts, there is an exacerbation of the risk that a verdict may result from boredom, cynicism or time pressure, rather than from a fair evaluation of the evidence.

The facts of this case underscore the importance of closing argument in the non-jury trial. Testimony from four witnesses was taken over a period of five days, broken up by the weekend. One of the two prosecution witnesses did not witness the alleged incident and the other, the complainant, was charged by appellant with having a motive to be vindictive. Appellant interposed an alibi, corroborated by his employer, that he was at work at the time in question. Absent summation, there was no guarantee that the

trial judge weighed the crucial aspects of the case with his attention drawn to the weaknesses of the prosecution's evidence and the strengths of appellant's defense. The refusal to hear counsel thus stripped appellant of his right to have his attorney utilize his professional skills in presenting his case in its strongest posture for consideration by the court. It thereby diluted substantially his rights to be heard and to the effective assistance of counsel.

ARGUMENT

POINT I

SECTION 320.20(3)(c) OF THE NEW YORK CRIMINAL PROCEDURE LAW, WHICH AUTHORIZES A TRIAL JUDGE TO PROHIBIT CLOSING ARGUMENT IN A NON-JURY TRIAL IS, ON ITS FACE AND AS APPLIED, VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE RIGHT TO COUNSEL PROVISION OF THE SIXTH AMENDMENT.

I.

Section 320.20(3) (c) of New York's recently enacted Criminal Procedure Law[5] authorizes the judge in a

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[5] N.Y.C.P.L. § 320.20 became effective on September 1, 1971 along with the entire Criminal Procedure Law. Prior to that date, no statute governed the procedure of the non-jury trial.

non-jury trial to dispense with closing argument. Invoking this statute, the trial court denied counsel's request to deliver a summation and thereby deprived appellant of his due process right to be heard as well as his right to the effective assistance of counsel.

It is basic to our adversary system of criminal justice that a defendant has a right to be heard on his own behalf and that such right is inseparable from his right to be heard by counsel at every critical stage of the criminal process.[6] Since *Powell v. Alabama*, 287 U.S. 45 (1932), wherever representation by counsel has been ordained by the Court, it has been accompanied by the recognition that counsel's presence alone does not necessarily guarantee the fairness required by the Constitution. Rather, in the now classic words of Mr. Justice Sutherland, an accused

> requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing and therefore of due process in the constitutional sense. 287 U.S. at 69.

[6] Thus, since *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court has held that a defendant is entitled to counsel at a trial for any crime punishable by imprisonment [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)]; at a preliminary hearing [*Coleman v. Alabama*, 399 U.S. 1 (1970)]; at sentence [*Mempa v. Rhay*, 389 U.S. 128 (1967)]; at a guilty plea [*White v. Maryland*, 373 U.S. 559 (1963)]; and on appeal taken as a matter of right [*Douglas v. California*, 372 U.S. 353 (1963)].

Relying on *Powell*, the Court has twice held state statutes which interfered with a defendant's right to the benefit of certain of counsel's professional functions during trial to be deprivations of the "guiding hand of counsel". *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

Brooks, which struck down a statute that required a criminal defendant to be the first defense witness or lose his right to testify, established that a defendant's right to have his attorney plan and order the presentation of such a critical aspect of his defense is guaranteed by the Due Process Clause. 406 U.S. at 612, 613. New York's statute, which permits a court to foreclose closing argument, is at odds with *Brooks'* sensitivity to the substantive meaning of the "guiding hand" concept enunciated in *Powell* because it, too, abridges defense counsel's control over a critical aspect of the defense—namely, his statement to the court of the very theory of the defense, presented cogently by virtue of his training, to convince the court to acquit his client.

Ferguson is even more compelling, for the Court there underscored the critical nature of an advocate's role in presenting factual data favorable to the defense to the fact-finder in an ordered, coherent and complete fashion. In striking down the Georgia statute which precluded counsel from eliciting the defendant's unsworn statement to the jury, the Court held that without counsel's "guiding hand" in the elicitation of that statement, relevant and critical facts might not be presented or might be presented incoherently or in a confused manner at best. 365 U.S. at 591, 595 and 596.

Section 320.20(3) (c) conflicts with *Ferguson* in that it sanctions a verdict based only on the judge's subjective view of the disjointed and unordered segments of the trial evidence. It thus deprives the accused of his basic right to have his defense presented to the finder of fact by a skillful advocate trained to articulate his side of the case in a coherent, organized and complete argument, with due emphasis on the factual and legal strengths of the defense case and the weaknesses of the prosecution's evidence. In a very real sense, the statute deprives a defendant of the "guiding hand of counsel" at no less a critical stage of the proceeding than did the *Ferguson* statute. In *Ferguson*, counsel's "guiding hand" was excised at the fact elicitation stage of the trial. Here, it is excised at the very threshold of the fact-finding stage. In constitutional terms, this is a distinction without a difference and *Ferguson* should be dispositive.

If *Ferguson* is not entirely dispositive, it surely points the way to a result consistent not only with constitutional doctrine but with the historical development of the importance of closing argument within our adversary system.[7] For historically, it was

[7]While the English common law has little bearing on the historical development of the right to closing argument in this country, since a defendant charged with a felony in England was prohibited from appearing with counsel until 1836, it is nonetheless significant that in 1865, the right to deliver a closing argument was statutorily recognized. The Criminal Procedure Act of 1865 included the following provision: "Upon every trial . . . whether the prisoners . . . or any of them shall be defended by counsel or not . . . such prisoner or their counsel shall be entitled . . . when all the evidence is concluded to sum up the evidence respectively." Archibold, *CRIMINAL PLEADING, EVIDENCE AND PRACTICE* § 558 (1969); Jenks, THE BOOK OF ENGLISH LAW 74 (1967).

virtually "the law of the land" that a defendant had a right to have his attorney deliver a closing argument.[8] This right developed primarily as a component of a defendant's right to counsel and was recognized well before both the application of the Sixth Amendment's counsel provision to the States[9] and the Constitutional sanctioning of the non-jury trial.[10]

As early as 1827, the Supreme Court of Virginia recognized that in the jury trial, even where there was only one unimpeached prosecution witness and no defense presentation, "it is the right of every party to be heard by counsel on his whole case." *Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 759 (1827). Other state courts readily followed suit, declaring that the right to closing argument was protected by their individual constitutional provisions guaranteeing the

[8]Treatises on trial conduct written during the last century are unanimous in stating that the right to counsel encompasses the right to have counsel deliver a closing argument. E.g. Hilliard, ON NEW TRIALS § 40 (1866); 1 Thompson, TRIALS § § 921, 955 (1889); 2 Hyatt, TRIALS § 1450 (1924); 5 Wharton, CRIMINAL LAW AND PROCEDURE § 2077 (1957).

[9]*Gideon v. Wainwright, supra*, n. 6, 372 U.S. 335.

[10]*Patton v. United States*, 281 U.S. 276 (1930). While there were instances of jury-trial waivers prior to *Patton*, they occurred mainly during colonial times and by the end of the nineteenth century were common only in Maryland and West Virginia. See *Singer v. United States*, 380 U.S. 24 (1965); Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 491 (1947); Puttkammer, ADMINISTRATION OF CRIMINAL LAW 117 (1953); Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1933-1934).

right to counsel.[11] Indeed, even prior to the Court's decision in *Gideon*, the Supreme Courts of Washington, Oregon and Alabama considered closing argument to be encompassed by both the federal and state constitutional guarantees of counsel.[12]

Today, the right to deliver a closing argument is contested only in the context of the non-jury trial. But, the weight of authority holds, nonetheless, that this right is guaranteed by the Sixth Amendment's counsel provision or the Due Process Clause of the Fifth and

[11]*Lynch v. State*, 9 Ind. 541 (1857); *People v. Green*, 99 Cal. 564, 34 Pac. 231 (1893); *People v. McMullen*, 300 Ill. 383, 133 N.E. 328 (1921); *Sizemore v. Commonwealth*, 240 Ky. 279, 42 S.W. 2d 328 (1931); *State v. Ballenger*, 202 S.C. 155, 24 S.E. 2d 175 (1943); *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943); *State v. Hardy*, 189 N.C. 799, 128 S.E. 152 (1925); *State v. Hoyt*, 47 Conn. 518 (1880); *State v. Page*, 21 Mo. 257 (1855); *State v. Shehoudy*, 45 N.M. 516, 118 P. 2d 280 (1941); *State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1902); *State v. Verry*, 36 Kan. 416, 13 Pac. 838 (1887); *Stewart v. Commonwealth*, 117 Pa. 378, 11 A. 370 (1887); *Weaver v. State*, 24 Ohio St. 584 (1874); *Williams v. State*, 60 Ga. 363 (1898); *Wingo v. State*, 62 Miss. 311 (1884). Most of these cases arose in the context of improper limitations of counsel's closing argument.

[12]*State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906); *State v. Rogoway*, 45 Or. 601, 78 Pac. 987; rehearing 45 Or. 611; 81 Pac. 234 (1904); *Yeldell v. State*, 100 Ala. 26, 14 So. 570 (1894).

Fourteenth Amendments.[13] Thus, in *United States v. Walls*, 443 F.2d 1220 (6th Cir., 1971), the court held that preclusion of closing argument in a non-jury trial deprived a defendant of the effective assistance of counsel. The same result was reached in *Thomas v. District of Columbia*, 90 F.2d 424 (D.C. Cir., 1937). In *United States ex rel. Spears v. Johnson*, 327 F.Supp.

[13]New York is the only state which, by statute, authorizes the trial court in a non-jury trial to dispense with closing argument. Although Indiana proposed a statute derived from and virtually identical to the New York provision challenged here [Ind. Code Crim. Proc., Proposed Final Draft § 35-6.1-7-1(c)3 (Sept., 1972)], it has not been enacted. Six make provision for closing argument without distinction between the jury or non-jury trial. See Ark. Stats. Ann., tit. 43, ch. 21, § 43-2132 (1947); Cal. Penal Code § 1093; Conn. Gen. Stats. Ann., tit. 54, ch. 96, § 54-88 (1958); Maine R. Crim. Proc. 30(a); Miss. Code Ann., tit. 99, ch. 17, § 99-17-11 (1972); Ohio Rev. Code Ann., tit. 29, § 2945.10 (1953). Others, as did New York prior to 1971, provide for closing argument specifically in the jury trial and are silent as to the non-jury trial. See, Ga. Code Ann., tit. 27, ch. 27-22, § 27-2201 (1972), Hawaii Rev. Stats., tit. 37, ch. 635 § 635-52 (Supp. 1972); Idaho Code Ann., tit. 19, ch. 21, § 19-2101 (1947); Ill. Ann. Stats., ch. 38, tit. VI, § 115-4 (1970); Iowa Code Ann., tit. 36, ch. 780 § 780.6 (1946); Ky. R. Crim. P. 9.42; Kan. Stats. Ann., ch. 22, art. 34, § 22-3414 (Supp. 1973); Mich. Comp. L. Ann., ch. 768, § 768.29 (1968); Minn. Stats. Ann., ch. 31, § 631.01 (1947); Mo. Ann. Stats. § 546.070 (1949); Rev. Code Mont., tit. 95, § 95-1910 (1947); Rev. Stats. Neb., ch. 29, § 29-2016 (1943); Nev. Rev. Stats., tit. 14, ch. 175, § 175.141 (1967); N.M.R. Crim. Proc. 40; Gen. Stats. N.C., ch. 84, § 84-14 (1963); N.D. Century Code, tit. 29, ch. 29-21, § 29-21-01 (1974); Okl. Stats. Ann., tit. 22, § 831 (1951); Ore. Rev. Stats., ch. 17, § 17.210 (1971); S.D. Comp. L. Ann., tit. 23, § 23-42-6 (1967); Tex. Code Crim. Proc., art. 36, § 36.01 (1966); Utah Code Ann., tit. 77, § 77-31-1(6) (1953); Wis. Stats. Ann., tit. 47, ch. 972, § 972.10 (1971); Wyo. Stats., tit. 7. § 7-228 (1957). The remaining states do not make any specific provision concerning closing argument.

1021 (E.D. Pa., 1971) rev'd. 463 F.2d 1024 (3rd Cir., 1972),[14] the court held preclusion of closing argument a deprivation of due process.

Similarly, a majority of state courts faced with the issue, pre- and post-*Gideon*, have held that the right of an accused to be heard on the evidence in a non-jury trial is guaranteed by either the Sixth or Fourteenth Amendments. *People v. Thomas*, 390 Mich. 93, 210 N.W. 2d 776 (1973); *Commonwealth v. McNair*, 208 Pa. Super. 369, 222 A.2d 599 (1966); *Commonwealth v. Gambrell*, 450 Pa. 290, 301 A.2d 596 (1973) [where the right was recognized but deemed waived]; *Yopps v. State*, 228 Md. 204, 178 A.2d 879 (1962); *Floyd v. State*, 90 So. 2d 105 (Fla. 1956); *Olds v. Commonwealth*, 10 Ky. (3 Ak. Marsh) 465 (1821).[15]

[14]The court's reversal was based upon a finding that the trial court had not, in fact, prohibited counsel from presenting a summation.

[15]Texas and Ohio in pre-*Gideon* decisions also confronted the issue and held that the right to a non-jury trial summation was guaranteed by their respective state constitutional gurantees of the right to counsel. *Walker v. State*, 133 Tex. Crim. 300, 110 S.W. 2d 578 (1937); *Ferguson v. State*, 133 Tex. Crim. 250, 110 S.W. 2d 61 (1937); *Anselin v. State*, 72 Tex. Crim. 17, 160 S.W. 713 (1913); *Decker v. State*, 113 Ohio St. 512, 150 N.E. 74 (1925).

Additionally, although in civil cases courts have been less strict in enforcing the right to closing argument [See Anno: Argument of Counsel, 38 ALR. 2d 1396, 1401 (1954)], two states have held that the right to deliver a closing argument in the civil non-jury trial is "absolute." *Callan v. Biermann*, 194 Kan. 219, 398 P.2d 355 (1965); *Aladdin Oil Burner Corp. v. Morton*, 117 N.J.L. 260, 187 A.350 (1936).

Most recently, the California Supreme Court held that a juvenile tried before a court without a jury is entitled to have his counsel deliver a closing argument. *In re* F., 113 Cal. Rptr. 170, 520 P.2d 986 (1974). In *dicta*, the court noted that a similar right was compelled in non-jury adult criminal proceedings.[16] The court's reasoning is applicable to both proceedings:

> As there is a constitutional right to the assistance of counsel to ascertain whether a juvenile has a defense to a jurisdictional charge and to "prepare and submit" a defense, it surely follows that counsel would be precluded from discharging his duties if, after all the testimony had been received, a presentation of the defense was limited by the denial of an opportunity, through argument, to reconcile the testimony with the juvenile's innocence of the charges and attempts to persuade the court to that view. The "guiding hand of counsel" would thus be withdrawn at an important "step of the proceedings against" the juvenile.[17]
>
> *In re F., supra*, 113 Cal. Rptr. at 173; 520 P.2d at 989.

[16]This *dicta* is supported by *People v. Douglas*, 31 Cal. App. 3rd Supp. 26, 106 Cal. Rptr. 611 (App. Dept., 1973).

[17]The following courts have declined to recognize the right to present closing argument in the non-jury trial: *West v. United States*, 399 F.2d 467 (5th Cir., 1968) cert. den. 393 U.S. 1102 (1969); *Casterlow v. State*, 256 Ind. 214, 267 N.E. 2d 552 (1971); *Reed v. State*, 232 Ind. 68 (1953); *People v. Manske*, 399 Ill. 176, 77 N.E. 2d 164 (1948); *People v. Berger*, 284 Ill. 47, 119 N.E. 975 (1918); *Lewis v. State*, 11 Ga. App. 14, 74 S.E. 442 (1912). These courts have provided little elucidation of their reasons for the adoption of this rule. Indeed, in *Lewis v. State, supra*, no opinion was written. It is interesting to note, however, that in *People v. Manske, supra*, the court declared that as a general rule it was of the opinion that the court in a non-jury trial *should* listen to the arguments of counsel, even when it does *not* appear helpful. 399 Ill. 176 at 185, 77 N.E. 2d 164 at 170.

II.

Preclusion of a defendant's right to closing argument in a non-jury trial not only seriously dilutes the role of counsel in the presentation of the defense and thereby deprives him of his basic right to be heard; it also undermines the integrity of the fact-finding process and enhances the possibility of error in the ultimate verdict rendered.

An appreciation of the fact-finding process in a bench trial demonstrates that closing argument is perhaps more crucial to the presentation of a defense than in a jury trial. A judge does not differ from individual jurors in his ability to retain and assemble material which has come before him during the days or possibly weeks of trial. Judicial training, while affecting legal expertise, does not afford improved ability to remember or to reconstruct facts accurately. The fallibility of the human mind afflicts judges no less than jurors.

Moreover, a jury, by definition makes a collective judgment and, as Mr. Justice Powell has observed, "[t]his collective judgment tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision." See Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 4 (1966). A judge, in contrast, comes to his decision unaided by the recollections or points of view of others. In the absence of closing argument by the respective parties, the judge receives no in-put at all into his decision-making process that could minimize the possibility of a premature decision, counterbalance any prejudice developed during trial or alert him to possible error in his own

recollection of the evidence. Closing argument, however, diminishes the possibility of an erroneous verdict resulting from these human frailties.[18]

It is noteworthy that unlike the federal non-jury trial where counsel can require the court to render fact findings with its verdict[19] and thereby obtain at least some assurance that the fact-finder has considered the factual material and evaluated it *in toto*, New York has no comparable safeguard and thus the basis for the court's verdict is impenetrable. However, when the judge in the non-jury trial is required to hear closing arguments, at the very least, he must be attentive to the facts presented by opposing counsel and weigh their respective merits. Indeed, he may seek clarification of

[18]That these problems are very real in the bench trial is well illustrated in James, CRISIS IN THE COURTS 191, 192 (1967). The author quotes Professor Zeisel's statement that the theory that judges can be as fair as a jury "assumes that judges are perfect human beings . . . an assumption that is unfortunately far from the truth." Similarly, James quotes Donald Ross, a spokesman for the Milwaukee Defense Research Institute as saying: "While a judge has special legal knowledge, he is still just one person, filled with the prejudices and biases that are a part of each one of us." Finally, according to Jacob Fuchsberg, former president of the American Trial Lawyers Association and presently Associate Judge-Elect of the New York Court of Appeals:

> "Judges have no monopoly on intelligence, insight, or fairness. They are ordinary human beings like anyone else. I believe the opinions of 12 people are better than the opinions of one—and I don't care whether they are 12 lawyers, 12 judges or 12 laymen.
>
> "When 12 people must come to a decision, the prejudices that are inherent in most people get worked out in the discussion that is involved."

[19]Fed. R. Crim. Proc. 23(c).

troublesome aspects of the case through questions directed to counsel. In short, he would be unable to rest solely on his subjective belief that his recollection and understanding of the testimony was the only accurate portrayal available.

At this point in our history, closing argument is also of critical importance because of the tremendous caseloads handled by our courts. Urban courts, particularly, handle so enormous a volume of cases that they are able neither to mete out prompt and certain justice nor to give defendants the protections they should have.[20] Indeed, the Court has already recognized that in the lower criminal courts which process most of our criminal cases and which have a very high incidence of non-jury trials, speed and not truth is often the watchword.[21] A judge may handle many cases in a given day or week and may be too harried to give his undivided attention to the trial before him.[22] The

[20]President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 1 (1967).

[21]*Argersinger v. Hamlin supra* n. 6, 407 U.S. 25 at 34-35. TASK FORCE REPORT: THE COURTS *supra* n. 19 at 55; Kalven & Zeisel THE AMERICAN JURY 18 (1966).

[22]As Dean Edward Barrett has observed of the lower criminal courts:

> "But if one enters the courthouse in any sizeable city and walks from court room to court room, what does one see? One judge, in a single morning, is accepting guilty pleas from and sentencing a hundred or more persons charged with drunkenness. Another judge is adjudicating traffic cases with an average time of no more than a minute *per* case. A third is disposing of a hundred or more

"case-hardened" judge may be inattentive for any number of reasons.[23] In such circumstances, closing argument may too easily be dispensed with as a time-saving device. Yet it is just such a situation which most threatens the reliability of our fact-finding process

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> other misdemeanor offenses in a morning by granting delays, accepting pleas of guilty and imposing sentences.
>
> Whenever the visitor looks at the system he finds great numbers of defendants being processed by harrassed and overworked officials.
>
> Jones, Ed., THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 87 (1965).

[23]Indeed, inattentiveness has been ranked by one author as one of the leading causes of incompetence within the judiciary. Of the inattentive judges he writes:

> These men have heard it all before, find judging boring, or simply couldn't care less. They lean back with their eyes closed, read, doodle on a legal pad or stare out of the window. I have watched some talk on the telephone or hold whispered conversations with aids who want papers signed while witnesses testify. And this has happened in non-jury cases.
>
> In Miami Fla., Judge T_____ leaned back in his chair with his eyes closed, his arms behind his head, as he tried two men for running a bookie joint. A few minutes later he admitted in open court he 'wasn't paying attention' to some of the evidence.
>
> CRISIS IN THE COURTS, *supra* n. 18 at 7.

The same problem was also pointed out by the Hon. Myron Gordon writing about the value of summation in the non-jury trial:

> Before counsel waives oral argument, he would do well to consider whether the judge may have only appeared to be listening to the witnesses but did not in fact hear them. Counsel cannot really be sure that during the trial the judge was not thinking of some other case (or perhaps about his troublesome prostate).
>
> Gordon, *Non-Jury Summations*, 6 Am. Jur. Trials 771, 777 (1967).

and which renders closing argument indispensable in a trial process which is premised on the assumption that a verdict will be based upon a fair evaluation of the evidence and not result from cynicism, boredom or pressure to move on to the next case.

Preclusion of closing argument also undermines the integrity of the judicial system and the public attitude toward it. When a trial judge, upon whom the public looks as the representative of the legal order,[24] refuses a request to argue on behalf of an accused, it appears not only to the defendant and his lawyer but to all in the courtroom, that he is arbitrary, possibly prejudiced against the defendant or has decided prematurely a matter which is gravely serious to those concerned. Because society's prevailing impression concerning the fairness of our legal institutions depends almost entirely upon observation of the trial court's integrity, humaneness and efficiency,[25] a statute sanctioning the appearance of arbitrariness and prejudice can only do harm to that

[24]THE COURTS, THE PUBLIC AND THE LAW EXPLOSION, *supra* n. 22 at 125; TASK FORCE REPORT: THE COURTS, *supra* n.20 at 65-66.

[25]THE COURTS, THE PUBLIC AND THE LAW EXPLOSION, *supra* n. 22 at 125.

institution.[26] As the late Mr. Justice Frankfurter has written, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

The facts in this case underscore the importance of summation in the non-jury context. This was a trial which involved four witnesses, consisted of three days of testimony and extended over a five day period broken up by a weekend. The defense not only attacked the credibility of the complainant, who admitted prior drug use and familiarity with appellant, but also demonstrated a likely motive for Braxton to "fix" appellant and interposed an alibi corroborated by his employer that at the time of the crime he was at work. The only rebuttal to the alibi was that the crime occurred within walking distance of appellant's place of employment and it was possible for him to have sneaked out to rob the complaining witness.

In short, the evidence was in sharp conflict and before coming to its verdict the court had considerable

[26]Indeed, many have observed the pervasive belief among the impoverished and minority group residents of urban ghettos who enter our courtrooms either as defendants or as relatives or friends of the defendants, that justice is dispensed on an assembly-line basis by judges who are of predominantly white, middle-class backgrounds who are either unaware of their problems, indifferent to them or actually hostile to them. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam Ed. 1968); Wright, *The Courts Have Failed the Poor*, N.Y. Times (Magazine), March 9, 1969, p. 26; President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 127, 128 (1967). Katz, *Municipal Courts – Another Urban Ill*, 20 Case West. L. Rev. 87, 90-91, 110, 122 (1968); THE AUTOBIOGRAPHY OF MALCOLM X 149-150 (Grove Press Ed. 1966).

detail to weigh. Appellant was entitled to have his attorney utilize his professional skill in pointing out the weaknesses in the prosecution's case and in marshalling the relevant and material evidence favorable to the defense into a cogent argument on his behalf. Deprived of this right, appellant was left to the mercy of the judge's subjective and impenetrable view of the case delivered in the form of a guilty verdict eight minutes after the close of the testimony.

In sum, Section 320.20(3)(c) of New York's Criminal Procedure Law disregards a fundamental tenet of our jurisprudence–that closing argument is basic to the concept of advocacy within our adversary system of criminal justice. A defendant is entitled to have "the guiding hand" of his attorney operate on his behalf in the fullest sense until the trier of fact retires to deliberate. Due process of law in this context can mean no less than Daniel Webster's often quoted phrase: "a law which hears before it condemns."[27]

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[27]See *Thomas v. District of Columbia*, 90 F.2d 424 at 428 (D.C. Cir., 1937).

CONCLUSION

WHEREFORE, FOR THE FOREGOING REASONS, APPELLANT PRAYS THE JUDGMENT BELOW BE REVERSED.

Respectfully submitted,

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